United States Court of Appeals

for the Second Circuit

APPENDIX

76-1236 B

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

MANUEL FRANCISCO PADILLA MARTINEZ,

Appellant.

Docket No. 76-

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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MQC:bj
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A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA, :

- v - : INDICTMENT

REV. ALBERTO MEJIAS, a/k/a Rev. Angel Ortiz, a/k/a Rev. Roneld Powem, a/k/a Francisco Ignacio Roldan Mejia; : 76 Cr. 164

MARIO NAVAS, a/k/a Mario Rodriguez, a/k/a Victor Jaramillo, a/k/a Isidoro Colon; :

ESTELLA NAVAS, a/k/a Estella Rodriguez, a/k/a Maria Torres; :

HENRY CIFUENTES-ROJAS, a/k/a Botellon, a/k/a Botello, a/k/a Freddy Valdes, a/k/a Carlos Vega, a/k/a Jose Lopez Moralez; :

JOSE RAMIREZ-RIVERA, a/k/a Hugo, a/k/a Juan Ramirez; :

MANUEL FRANCISCO PADILLA MARTINEZ; :

FRANCISCO CADENA, a/k/a Francisco Salazar; :

ALBA LUZ VALENZUELA;

JOSE ANTONIO LOPEZ, and :

JUAN GUILLERMO MESA, a/k/a Juangi, a/k/a Carrancho, :

Defendants. :

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COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of January, 1972, and continuously thereafter up to and including October 4, 1974 in the Southern District of New York and elsewhere, REV. ALBERTO MEJIAS, a/k/a Rev. Angel Ortiz, a/k/a Rev. Roneld Powem, a/k/a Francisco Ignacio Roldan Mejia; MARIO NAVAS, a/k/a Mario Rodriguez, a/k/a Victor Jaramillo, a/k/a Isidoro Colon; EETELLA NAVAS, a/k/a Estella Rodriguez, a/k/a Maria Torres; HENRY CIFUENTES-ROJAS, a/k/a Botellon, a/k/a Botello, a/k/a Freddy Valdes, a/k/a Oscar Gomez, a/k/a Oscar Vega, a/k/a Carlos Vega, a/k/a Jose Lopez Moralez; JOSE RAMIREZ-RIVERA, a/k/a Hugo, a/k/a Juan Ramirez; MANUEL FRANCISCO PADILLA MARTINEZ;

n-1574 FRANCISCO CADENA, a/k/a Francisco Salazar;

ALBA LUZ VALENZUELA;

JOSE ANTONIO LOPEZ, and

JUAN GUILLERMO MESA, a/k/a Juangi, a/k/a Carrancho, the defendants, and

Francisco Javier Velez-Moralez, a/k/a Mono, a/k/a Pacho, a/k/a Elkin Diaz, a/k/a Francisco Adriano Armedo-Sarmiento;

Alberto Bravo;

Carlos A. Bravo, a/k/a Bruno, a/k/a Ivan Berrios;

Griselda Blanco;

Bernardo Roldan;

Jose Antonio Cabrera-Sarmiento, a/k/a Pepe, a/k/a El Tio;

Edgar Restrepo-Botero, a/k/a Cacheton, a/k/a Cachetes, a/k/a El Sobrino, a/k/a Omar Hernandez, a/k/a Rafael Torres, a/k/a Arturo Velasquez;

Arturo Gonzalez, a/k/a Abraham Gonzalez, a/k/a Abran, a/k/a Roberto Ortiz-Torres;

Jorge Gonzalez, a/k/a Anibal Ramirez Roman;

Ramiro Duque Estrada, a/k/a Libardo Gil, a/k/a El Zarco;

Carmen Julia Restrepo-Mazo, a/k/a Carmen Gil, a/k/a Amparo Gomez;

Alvaro Hernandez, a/k/a Balmores;

Raul Diaz, a/k/a Alejandro Gallego Hernandez;

Carmensa Gomez, a/k/a Miryam Ramona Venee Lopez;

Adriana Gonzalez Restrepo, a/k/a Berta;

Maria del Carmen Moreno;

Daniel Torres;

Hugo Diaz, a/k/a Victor Hugo Diaz;

Esmerida Sanchez;

Lilia Prada;

Ruben Guttierez;

Jane Doe, a/k/a Lina Ramirez, a/k/a wife of defendant Jose Ramirez-Rivera, a/k/a Hugo, a/k/a Juan Ramirez;

Renee Rondinell, a/k/a Rita Ramos;
John Doe, a/k/a Carlos Julio;
Walter Rodriguez, a/k/a Walter Velez;
Maria Magdalena, a/k/a LaNegra, a/k/a Pilar Sanchez;
Jorge Hernandez, a/k/a Jorge Gomez;
John Doe, a/k/a Humberto;
Oscar Catiri, a/k/a Saul Hernandez,
Pedro Bello;
Jose Salazar, a/k/a Guillermo Gonzalez;
John Doe, a/k/a Palitraque and
Cesar Julio Riveros-Rincon, who are named herein as co-conspirators but not as defendants, and others to the Grand Jury known and unknown, (hereinafter "unindicted co-conspirators"), unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1), 841(b)(1)(A), 952(a), 955, 959, 960(a) and 960(b)(1) of Title 21, United States Code.

MEANS

2. It was a part of said conspiracy that the defendants and unindicted co-conspirators unlawfully, intentionally and knowingly would manufacture and distribute large quantities of a Schedule II narcotic drug controlled substance, to wit, cocaine, in Colombia, South America and elsewhere to the Grand Jury unknown, intending and knowing that such cocaine would be unlawfully imported into the United States in violation of Sections 812, 959, 960(a)(3) and 960(b)(1) of Title 21, United States Code.

3. It was further a part of said conspiracy that the defendants and unindicted co-conspirators unlawfully, intentionally and knowingly would then ship large quantities of cocaine to the United States and import it from South America directly into the United States at Miami, Florida,

Philadelphia, Pennsylvania, New York, New York and elsewhere and indirectly into the United States, through Spain, Germany, Canada and Mexico, at New York, New York, the United States Canadian border, and elsewhere in violation of Sections 812, 952(a) and 960(b)(1) of Title 21, United States Code.

4. It was further a part of said conspiracy that the defendants and unindicted co-conspirators, in order to ship cocaine into the United States, unlawfully, intentionally and knowingly would bring and possess said cocaine on board seagoing and other vessels, aircraft and vehicles of a carrier, arriving in the United States. Said cocaine was concealed in body belts and shoes worn by individual defendants and unindicted co-conspirators and was concealed behind the lining of their luggage, in the walls of large commercial shipping containers, in hollowed out soles and heels of shoes, in hollowed out clothes-hangers and in other containers in violation of Sections 812, 955, 960(a)(2) and 960(b)(1) of Title 21, United States Code.

5. It was further a part of said conspiracy that, after cocaine was imported into the United States, the defendants and unindicted co-conspirators unlawfully, intentionally and knowingly would transport the cocaine into the boroughs of Manhattan and Queens, in New York City and elsewhere and would there distribute and possess with the intent to distribute cocaine in violation of Sections 812, 841(a)(1) and 841 (b)(1) (A) of Title 21, United States Code.

6. It was further a part of said conspiracy that the defendants and unindicted co-conspirators unlawfully, intentionally and knowingly would distribute cocaine and would possess it with the intent to distribute it in New York City and elsewhere in large quantities, the exact amount

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thereof to the Grand Jury unknown, in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

7. It was further a part of said conspiracy that the defendants and unindicted co-conspirators unlawfully, intentionally and knowingly would distribute marijuana and would possess it with the intent to distribute it in New York City and elsewhere in large quantities, the exact amount thereof to the Grand Jury unknown, in violation of Sections 812, 841(a)(1) and 841(b)(1)(B) of Title 21, United States Code.

8. It was further a part of said conspiracy that the defendants and unindicted co-conspirators unlawfully, wilfully and knowingly would use and carry firearms to commit and during the commission of the felonies set forth in Counts One through Five of this indictment, in violation of Title 18, United States Code, Section 924(c).

9. It was further a part of said conspiracy that the defendants and unindicted co-conspirators wilfully and knowingly would use false documents and would use false identities in obtaining apartment leases, automobile rentals, driver's licenses, telephone listings and passports.

10. It was further a part of said conspiracy that the defendants and unindicted co-conspirators wilfully and knowingly would disguise their written and oral communications made in furtherance of this conspiracy.

11. It was further a part of said conspiracy that the defendants and unindicted co-conspirators would collect large sums of United States currency in payment for the cocaine they sold and convert it into money orders of $500 and other denominations.

12. It was further a part of said conspiracy that the defendants and unindicted co-conspirators would ship money and money orders to Colombia, South America an

elsewhere by mail, on the person of travelers and in other ways for the purchase of additional large quantities of cocaine which was to be imported into and distributed in the United States.

13. It was further a part of said conspiracy that the defendants and unindicted co-conspirators wilfully and knowingly would provide money for bail for members of the conspiracy who might be and were arrested.

OVERT ACTS

In pursuance of this conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

1. In or about August, 1972, co-conspirator Jose Antonio Cabrera-Sarmiento gave co-conspirator Carmen Caban $16,000 for delivery to co-conspirators Alberto Bravo and Oscar Catiri in Bogota, Colombia, South America, as payment for a quantity of cocaine.

2. On or about September 15, 1972, co-conspirators Arturo Gonzalez and Cesar Julio Riveros-Rincon met with Detective Arthur Drucker, who was acting in an undercover capacity as a narcotics buyer, at the Imperial Bar, Roosevelt Avenue, Queens, New York and negotiated to sell Detective Drucker approximately 5 pounds of cocaine.

3. On or about September 21, 1972, at the Imperial Bar, Detective Drucker met co-conspirator Cesar Julio Riveros-Rincon who advised Detective Drucker that a shipment of 11 pounds of cocaine had been seized in Philadelphia and that the delivery of cocaine to Detective Drucker could not be made.

4. In or about June, 1973, co-conspirator John Doe, a/k/a Carlos Julio, and another received a payment of $10,000 from co-conspirator Jose Antonio Cabrera-Sarmiento,

for having smuggled approximately 11 pounds of cocaine into the United States from Colombia, South America.

5. On or about July 24, 1973, co-conspirator Edgar Restrepo-Botero delivered approximately 4.2 pounds of cocaine and three revolvers in a suitcase to co-conspirator Carmen Caban to hold for him and for co-conspirator Jose Antonio Cabrera-Sarmiento.

6. On or about August 1, 1973, co-conspirators Lilia Prada and Ruben Guttierez sold more than 12 ounces of cocaine to Detective Luis Ramos, who was acting in an undercover capacity as a narcotics buyer, for $8,400 at 118 West 109th Street, Manhattan, New York.

7. From on or about August 31, 1973 to on or about September 1, 1973, co-conspirators Lilia Prada and Ruben Guttierez sold in excess of one pound of cocaine to Detective Luis Ramos, who was acting in an undercover capacity as a narcotics buyer, for $10,000 at 243 West 107th Street, New York, New York.

8. On or about September 19, 1973, defendant REV. ALBERTO MEJIAS entered the United States at San Juan, Puerto Rico using Colombian passport No. G029291, issued in the name of Francisco Ignacio Roldan Mejia.

9. In or about November, 1973, defendants REV. ALBERTO MEJIAS and FRANCISCO CADENA had a meeting.

10. On or about January 3, 1974, co-conspirator Lilia Prada used the telephone at apartment 1W, 118 W. 109th Street, Manhattan, New York, number 850-3056, which telephone was subscribed in the name of Ruben Prada.

11. On or about January 4, 1974, co-conspirator Lilia Prada met with Detective Louis Vega, who was acting in an undercover capacity as a narcotics buyer, and negotiated

for the sale of 6.6 pounds of cocaine.

12. On or about January 30, 1974, defendant MARIO NAVAS used the telephone at apartment 242, 80-15 41st Avenue, Queens, New York, number 426-5584, which telephone was subscribed in the name of Mario Rodriguez.

13. On or about January 31, 1974, at approximately 7:40 P.M., co-conspirator Lilia Prada possessed approximately 1/4 pound of cocaine inside apartment 4W, 243 W. 107th Street, Manhattan, New York.

14. On or about February 5, 1974, defendant MARIO NAVAS sold approximately 8 ounces of cocaine in the presence of Detective Luis Ramos at 118 West 109th Street, Manhattan, New York.

15. On or about February 26, 1974, at approximately 9:00 p.m., defendants Rev. Alberto Mejias and MARIO NAVAS entered the building located at 80-15 41st Avenue, Queens, New York.

16. On or about March 5, 1974, at 132-65 Pople Avenue, Queens, New York, defendant MARIO NAVAS and others to the Grand Jury unknown, were sifting a white powder at a table on which was placed a firearm.

17. On or about March 22, 1974, defendants JUAN GUILLERMO MESA and MARIO NAVAS had a conversation in front of the Green Derby Restaurant, 978 Second Avenue, Manhattan, New York.

18. On or about April 18, 1974, defendant REV. ALBERTO MEJIAS had a telephone installed in apartment 1B, 445 W. 48th Street, Manhattan, New York, number 582-7866, which telephone was subscribed in the name of Rev. Alberto Mejias.

19. On or about April 26, 1974, defendant REV. ALBERTO MEJIAS received United States passport number E863388, issued in the name of Angel Ortiz.

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20. On or about May 4, 1974, defendant MARIO NAVAS used the telephone at apartment 10F, 215 East 64th Street, Manhattan, New York, number 355-3198, which telephone was subscribed in the name of Marconi Roldan.

21. On or about May 8, 1974, between approximately 9:55 p.m. and 10:36 p.m., defendant HENRY CIFUENTES-ROJAS attempted to telephone Medellin, Colombia at the request of co-conspirator Francisco Javier Velez-Moralez from the latter's apartment, number 10F, 215 East 64th Street, Manhattan, New York.

22. On or about May 9, 1974, co-conspirator Francisco Javier Velez-Moralez and co-conspirator John Doe a/k/a Molina and others to the Grand Jury unknown, discussed the price of 2.2 pounds of cocaine to be delivered in Miami, Florida.

23. On or about May 13, 1974, defendant REV. ALBERTO MEJIAS entered 215 East 64th Street, Manhattan, New York.

24. On or before June 6, 1974, defendant REV. ALBERTO MEJIAS brought to New York City from Miami, Florida approximately nine pounds of cocaine.

25. On or about June 6, 1974 defendant REV. ALBERTO MEJIAS wrote a letter in which he reported his receipt of cocaine to co-conspirator John Doe, a/k/a Carlos Julio.

26. On or about June 28, 1974, at approximately 10:29 p.m., defendant MARIO NAVAS used the telephone at apartment 5E, 61-25 98th Street, Queens, New York, number 699-0942, which telephone was subscribed in the name of Victor Jaramillo.

27. On or about June 28, 1974, at approximately 10:29 p.m., co-conspirator Francisco Javier Velez-Moralez, and defendants MARIO NAVAS and ESTELLA NAVAS discussed the delivery of a false passport to co-conspirator Raul Diaz.

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28. On or about June 29, 1974, at approximately 10:50 a.m., co-conspirator Francisco Javier Velez-Moralez, discussed with co-conspirator Marconi Roldan the delivery by co-conspirator Bernardo Roldan of false passports to co-conspirator Raul Diaz.

29. On or about July 1, 1974, at approximately 6:03 p.m., defendant MARIO NAVAS discussed with co-conspirator CARMENSA GOMEZ the delivery of false passports to her from co-conspirator Bernardo Roldan in Medellin, Columbia.

30. On or about July 3, 1974, defendant MARIO NAVAS and co-conspirator RAUL DIAZ had a discussion regarding CARMENSA GOMEZ.

31. On or about Friday, July 5, 1974, at approximately 6:04 p.m., defendant REV. ALBERTO MEJIAS and co-conspirator Francisco Javier Velez-Moralez, discussed the distribution of cocaine and marijuana.

32. On or about July 6, 1974, at approximately 2:35 p.m., defendant JUAN GUILLERMO MESA told co-conspirator Jose Salazar that co-conspirator Daniel Torres would depart Munich, Germany on Lufthansa Airlines flight number 408 and would arrive in New York about noon on July 7, 1974.

33. On or about July 6, 1974, at approximately 5:18 p.m., defendant JUAN GUILLERMO MESA told defendant ESTELLA NAVAS that co-conspirator Daniel Torres would depart Munich, Germany on Lufthansa Airlines flight number 408, carrying cocaine, and would arrive in New York about noon, July 7, 1974.

34. On or about July 6, 1974, at approximately 7:45 p.m., co-conspirator Francisco Velez-Moralez carried a large cardboard box from the building located at 48-72 37th

n-1574 Street, Queens, New York and placed it in a white Chevrolet.

35. On or about July 6, 1974, at approximately 8:05 p.m., co-conspirator Francisco Javier Velez-Moralez, carried a large cardboard box from the aforementioned white Chevrolet into the building located at 327 West 30th Street, Manhattan, New York.

36. On or about July 7, 1974, defendant JUAN GUILLERMO MESA told co-conspirator Daniel Torres to telephone Las Dos Jotas (The Two J's) upon his arrival in New York.

37. On or about July 7, 1974, at approximately 8:03 a.m., defendant MARIO NAVAS told defendant JUAN GUILLERMO MESA that co-conspirator Raul Diaz would be arriving in New York City on that date.

38. On or about July 7, 1974, co-conspirator Daniel Torres arrived at John F. Kennedy International Airport on Lufthansa Airlines flight number 408 carrying approximately six pounds of cocaine and telephoned Las Dos Jotas (The Two J's).

39. On or about July 7, 1974, at approximately 6:25 p.m., co-conspirator Daniel Torres, carrying approximately six pounds of cocaine, and defendant MARIO NAVAS were across the street from each other at the intersection of 53rd Street and Roosevelt Avenue, Queens, New York, in the vicinity of Las Dos Jotas (The Two J's).

40. On or about July 7, 1974, at approximately 7:26 p.m., defendant MARIO NAVAS telephoned Munich, Germany and informed co-conspirator John Doe, a/k/a Humberto that co-conspirator Daniel Torres was arrested and that co-conspirator John Doe, a/k/a Humberto and defendant JUAN GUILLERMO MESA should move to another hotel.

41. On or about July 8, 1974, at approximately 3:06 a.m., defendant MARIO NAVAS told defendant JUAN GUILLERMO MESA of the arrest of Daniel Torres and of the

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42. On or about July 8, 1974, at approximately 7:54 p.m., co-conspirator Francisco Javier Velez-Moralez, asked defendant MARIO NAVAS if co-conspirator Raul Diaz had arrived yet.

43. On or about July 10, 1974, at approximately eleven minutes of 1:00 a.m., co-conspirator Hugo Diaz and defendant MARIO NAVAS discussed the sale of a quantity of cocaine for $12,500.00.

44. On or about July 10, 1974, at approximately 10:10 a.m., co-conspirator Hugo Diaz and defendant MARIO NAVAS agreed to meet at 60th Street and Second Avenue in Manhattan, New York at 12 noon that day.

45. On or about July 10, 1974, at approximately 12:00 noon, co-conspirator Hugo Diaz delivered a quantity of cocaine to defendants MARIO NAVAS and ESTELLA NAVAS in the vicinity of 60th Street and Second Avenue, Manhattan.

46. On or about July 10, 1974, shortly after noon, defendants MARIO NAVAS and ESTELLA NAVAS travelled from the vicinity of 60th Street and Second Avenue, Manhattan to 59-21 Calloway Street, Queens, New York.

47. On or about July 10, 1974, at approximately 3:50 p.m., co-conspirator Walter Rodriguez was in apartment 4G at 59-21 Calloway Street, Queens, New York.

48. On or about July 10, 1974, at approximately 5:58 p.m., co-conspirator Walter Rodriguez told defendant MARIO NAVAS that he saw people looking at him through binoculars.

49. On or about July 10, 1974, at approximately 6:40 p.m., defendants MARIO NAVAS and ESTELLA NAVAS were in the vicinity of 59-21 Calloway Street, Queens, New York.

50. On or about July 10, 1974, at approximately 10:49 p.m., defendant MARIO NAVAS told co-conpirator Hugo Diaz that the quality of the cocaine was good.

51. On or about July 11, 1974, at approximately 10:32 a.m., co-conspirator Raul Diaz informed defendant MARIO NAVAS that his flight would depart at 2:45 p.m. and would arrive at 8:30 p.m.

52. On or about July 11, 1974, at approximately 7:18 p.m., co-conspirator Maria Magdelena ordered cocaine from defendant MARIO NAVAS.

53. On or about July 12, 1974, at approximately 12:19 p.m., defendants MARIO NAVAS and JUAN GUILLERMO MESA discussed the failure of co-conspirators Raul Diaz and Carmensa Gomez to arrive as expected.

54. On or about July 12, 1974, at approximately 10:43 p.m., co-conspirator Adriana Gonzalez Restrepo told co-conspirator Jorge Hernandez to make arrangements for a Puerto Rican to travel to Toronto, Canada to receive a delivery of cocaine.

55. On or about July 13, 1974, at approximately 12:38 p.m., co-conspirator Jorge Hernandez told defendant ESTELLA NAVAS that he needed a Puerto Rican to meet co-conspirator Adriana Gonzalez Restrepo in Toronto to receive a delivery of cocaine.

56. On or about July 13, 1974, co-conspirators Adriana Gonzalez-Restrepo and Maria Del Carmen Moreno arrived at the Toronto International Airport, Toronto, Canada, aboard Air Canada flight number 993 from Kingston, Jamaica.

57. On or about July 13, 1974, at approximately 2:50 p.m., defendant MARIO NAVAS told co-conspirator Francisco Javier Velez-Moralez that co-conspirators Raul Diaz and Carmensa Gomez had been arrested.

58. On or about July 14, 1974, at approximately 3:25 p.m., co-conspirator Jorge Hernandez told defendant ESTELLA NAVAS to advise co-conspirator Adriana Gonzalez-Restrepo that he was in Room 210 at the Ontario Motel in Buffalo, New York.

59. On or about July 14, 1974, co-conspirator Maria Del Carmen Moreno possessed approximately 2.2 pounds of cocaine concealed in six wooden coat hangers.

60. On or about July 15, 1974, co-conspirators Jorge Hernandez, Jose Cruz and Jose Pizzaro met in Room 210 of the Ontario Motel in Buffalo, New York.

61. On or about August 17, 1974, defendants MARIO NAVAS and ESTELLA NAVAS used the telephone at apartment B-204, 61-20 Grand Central Parkway, Queens, New York, number 699-5429, which telephone was subscribed in the name of Isidoro Colon.

62. On or about August 27, 1974, defendant FRANCISCO CADENA opened an account at the East New York Savings Bank, Manhattan, New York.

63. On or about August 27, 1974, defendant FRANCISCO CADENA told an employee of the East New York Savings Bank, Manhattan, New York his address was apartment 1B, 445 W. 48th Street, Manhattan, New York.

64. On or about August 29, 1974, at approximately 12:47 p.m., defendant MARIO NAVAS telephoned defendant HENRY CIFUENTES-ROJAS at apartment 6A, 327 W. 30th Street, Manhattan, New York.

65. On or about August 29, 1974, at approximately 12:47 p.m., defendant HENRY CIFUENTES-ROJAS told defendant MARIO NAVAS that the price for 2.2 pounds of cocaine was $25,000.

66. On or about August 30, 1974, at approximately 1:50 a.m., defendants MARIO NAVAS and ESTRELLA NAVAS and co-conspirator Francisco Javier Velez-Moralez had a meeting in apartment 6A, 327 W. 30th Street, Manhattan, New York.

67. On or about Sunday, September 1, 1974, at approximately 5:59 p.m. defendant JOSE RAMIREZ-RIVERA, told co-conspirator Francisco Javier Velez-Moralez that he would deliver money orders to him on Tuesday, September 3, 1974.

68. On or about September 3, 1974, at approximately 9:02 a.m. co-conspirator Francisco Javier Velez-Moralez, telephoned 564-9297, which telephone was subscribed in the name of Freddy Valdez, apartment 6A, 327 W. 30th Street, Manhattan, New York.

69. On or about September 3, 1974, at approximately 10:35 a.m., co-conspirator Francisco Javier Velez-Moralez, telephoned defendant REV. ALBERTO MEJIAS and asked him if he had a quantity of cocaine for defendant MARIO NAVAS.

70. On or about September 3, 1974, at approximately 11:52 a.m., defendant MARIO NAVAS told defendant REV. ALBERTO MEJIA that he was going to the latter's apartment at 445 W. 48th Street, Manhattan, New York.

71. On or about September 3, 1974, on or before approximately 12:35 p.m., defendants HENRY CIFUENTES-ROJAS and JOSE RAMIREZ-RIVERA discussed the latter meeting with co-conspirator Francisco Javier Velez-Moralez.

72. On or about September 3, 1974, at approximately 2:05 p.m., defendant MARIO NAVAS, carrying a red plastic bag with a white handle, and defendant REV. ALBERTO MEJIAS entered 445 W. 48th Street, Manhattan, New York.

73. On or about Tuesday, September 3, 1974, at approximately 3:07 p.m., defendant JOSE RAMIREZ-RIVERA arranged to meet co-conspirator Francisco Javier Velez-Moralez at a gas station in Queens, New York.

74. On or about Tuesday, September 3, 1974, at approximately 3:15 p.m., co-conspirator Francisco Javier Velez-Moralez met defendant JOSE RAMIREZ-RIVERA who was carrying $10,000 in personal money orders, and co-conspirator John Doe, a/k/a Palitraque, at Colonial Road and 112th Street, Queens, New York.

75. On or about September 3, 1974, at approximately 3:30 p.m., defendants HENRY CIFUENTES-ROJAS and JOSE ANTONIO LOPEZ possessed approximately 3 3/4 pounds of cocaine in apartment 6A, 327 W. 30th Street, Manhattan, New York.

76. On or about September 3, 1974, at approximately 3:30 p.m., defendants HENRY CIFEUNTES-ROJAS and JOSE ANTONIO LOPEZ and co-conspirator Pedro Bello had a meeting in apartment 6A, 327 W. 30th Street, Manhattan, New York.

77. On or about September 3, 1974, at approximately 4:30 p.m., defendant MARIO NAVAS discussed selling 2.2 pounds of pure cocaine for $27,500 and selling approximately 1/4 pound of impure cocaine for $3,000.

78. On or about Septmeber 3, 1974, at approximately 5:00 p.m., defendant MANUEL FRANCISCO PADILLA MARTINEZ possessed records listing proceeds from the sale of cocaine.

79. On or about September 3, 1974, at approximately 5:00 p.m., defendants REV. ALBERTO MEJIAS, MANUEL FRANCISCO PADILLA MARTINEZ, FRANCISCO CADENA and ALBA LUZ VALENZUELA had a meeting in apartment 1B, 445 West 48th Street, Manhattan, New York.

80. On or about September 3, 1974 at approximately 5:10 p.m., defendants MANUEL FRANCISCO PADILLA MARTINEZ, FRANCISCO CADENA and ALBA LUZ VALENZUELA were counting money in apartment 1B, 445 W. 48th Street, Manhattan, New York.

81. On or about September 3, 1974, defendant REV. ALBERTO MEJIAS had in his possession approximately 12 bags containing a residue of cocaine.

82. On or about September 3, 1974, at approximately 9:34 p.m., co-conspirator Jane Doe, a/k/a Lina Ramirez, a/k/a wife of defendant Jose Ramirez-Rivera, a/k/a Hugo, a/k/a Juan Ramirez, asked co-conspirator Jane Doe, a/k/a Gael if co-conspirator Francisco Javier Velez-Moralez was there.

83. On or about September 4, 1974, co-conspirator Jane Doe, a/k/a Lina Ramirez, a/k/a wife of defendant Jose Ramirez-Rivera, a/k/a Hugo, a/k/a Juan Ramirez sent a message to defendant HENRY CIFUENTES-ROJAS to arrange to remove cocaine he stored at her house.

84. On or about September 5, 1974, co-conspirator Arturo Gonzalez told defendant MARIO NAVAS that he had hired an attorney for co-conspirator Francisco Javier Velez-Moralez.

85. On or about September 5, 1974, at approximately 2:52 p.m., defendant MARIO NAVAS offered to provide money to be used for bail for co-conspirator Francisco Javier Velez-Moralez.

86. On or about September 17, 1974, co-conspirator Arturo Gonzalez possessed approximately $26,000 in cash.

87. On or about September 30, 1974, co-conspirators Ramiro Duque Estrada and Carmen Julia Restrepo-Mazo possessed approximately 1 1/5 pounds of cocaine, approximately 19 pounds of marijuana, approximately $72,500 in money order receipts and approximately $70,000 in United States currency at apartment 3D, 580 Amsterdam Avenue, Manhattan, New York.

88. On or about October 4, 1974, at approximately 10:00 p.m., defendants MARIO NAVAS and ESTELLA NAVAS possessed approximately 3/4 pound of cocaine and approximately 10 pounds of marijuana in apartment B-204, 61-20 Grand Central Parkway, Queens, New York.

89. On or about October 4, 1974, at approximately 10:30 p.m., co-conspirator Walter Rodriguez possessed a quantity of non-narcotic white powder, approximately 359 pounds of marijuana, a hydraulic press, a 9MM semi-automati pistol and a semi-automatic rifle in apartment 4G, 59-21 Calloway Street, Queens, New York.

(Title 21, United States Code, Sections 846 and 963.)

COUNT TWO

The Grand Jury further charges:

On or about the 5th day of February, 1974, in the Southern District of New York, MARIO NAVAS, a/k/a Mario Rodriguez, a/k/a Victor Jaramillo, a/k/a Isidoro Colon, the defendant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 8 3/4 ounces of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT THREE

The Grand Jury further charges:

On or about the 10th day of July, 1974 in the Southern District of New York, MARIO NAVAS, a/k/a Mario Rodriguez, a/k/a Victor Jaramillo, a/k/a Isidoro Colon and ESTELLA NAVAS, a/k/a Estella Rodriguez, a/k/a Maria Torres, the defendants, unlawfully, wilfully and knowingly did distribute and possess with

$10,000 from co-conspirator Jose Antonio Cabrera-Sarmiento,

intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one (1) pound of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT FOUR

The Grand Jury further charges:

On or about the 3rd day of September, 1974, in the Southern District of New York, REV. ALBERTO MEJIAS, a/k/a Rev. Angel Ortiz, a/k/a Rev. Roneld Powem, a/k/a Francisco Ignacio Roldan Mejia, the defendant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 1 3/4 ounces of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT FIVE

The Grand Jury further charges:

On or about the 3rd day of September, 1974, in the Southern District of New York, HENRY CIFUENTES-ROJAS, a/k/a Botellon, a/k/a Botello, a/k/a Freddy Valdes, a/k/a Oscar Gomez, a/k/a Oscar Vega, a/k/a Carlos Vega, a/k/a Jose Lopez Moralez and Jose Antonio Lopez, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 3 3/4 pounds of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

Thomas J. Cahill

Foreman

THOMAS J. CAHILL
United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA, :

- against - : 76 Cr. 164

REV. ALBERTO MEJIAS, et al., :

Defendants. :

- x

A P P E A R A N C E S:

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Francisco Cadena

CARTER, District Judge

O P I N I O N

Defendants Rev. Alberto Mejias, Mario Navas, Estella Navas, Henry Cifuentes-Rojas, Jose Ramirez-Rivera, Manuel Francisco Padilla Martinez and Francisco Cadena [1] have moved for an order, pursuant to 18 U.S.C. §3164(b) and (c), releasing them from custody. The motion is denied. Because of the critical importance of the issues raised on this motion to the administration of the criminal justice system, and because of the apparent conflict between the opinions expressed herein and a decision of the United States Court of Appeals for the Ninth Circuit, it is my hope that the Court of Appeals of this Circuit will agree to an expedited consideration of these issues so that they can be authoritatively resolved for the circuit.

Facts

On February 19, 1976, the moving defendants were indicted by the government and charged with conspiracy and various substantive violations of the federal drug laws. On the same day, the moving defendants were arrested by federal agents and taken into federal custody. No state detainer is presently lodged against any defendant. Each of the moving defendants has been

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[1] Defendant Alba Luz Valenzuela has been released on bail and is therefore not a party to this motion.

unable to post the required bail and has been incarcerated in continuous federal custody since their arrest on February 19, 1976. On May 17, 1976, hearings on various pretrial motions were commenced. These hearings are still in progress and will continue right up until the commencement of trial. 2/

Discussion

The Speedy Trial Act of 1974 (P.L. 93-619), 18 U.S.C. §3161 et seq., provides in §3164 as follows:

> "§3164. Interim limits
>
> (a) During an interim period commencing ninety days following July 1, 1975 and ending on the date immediately preceding the date on which the time limits provided for under section 3161(b) and section 3161(c) of this chapter become effective, each district shall place into operation an interim plan to assure priority in the trial or other disposition of cases involving --
>
> (1) detained persons who are being held in detention solely because they are awaiting trial.
>
> ...
>
> (b) During the period such plan is in effect, the trial of any person who falls within subsection (a)(1) ... of this section shall commence no later than ninety days following the beginning of such continuous detention ... . The trial of any

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2/ Although defendants seek further evidentiary hearings on wiretap minimization and violation of their Fifth Amendment rights by virtue of pre-indictment delay, it is likely that the trial will have commenced, when, as anticipated, this opinion is filed on May 24th.

person so detained ... on or before the first day of the interim period shall commence no later than ninety days following the first day of the interim period.

(c) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel ... shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial."

Pursuant to the requirements of Rule 50(b), F.R.Crim.P., and in conformity with the provisions of the Speedy Trial Act of 1974, the judges of the United States District Court for the Southern District of New York adopted the "Interim Plan Pursuant To The Provisions Of The Speedy Trial Act of 1974" (hereinafter the "Interim Plan"). 3/ Rule 3 of the Interim Plan provides, in pertinent part, as follows:

"3. Time Requirements for Trial of Defendants in Custody and of High Risk Defendants

(a)(1) Trial of a defendant held in custody solely for the purpose of trial shall commence within 90 days following the beginning of continuous custody."

3/ The Interim Plan is effective from September 29, 1975, through July 1, 1976, at which time a newly revised Interim Plan will take effect.

Rule 4 of the Interim Plan provides, in pertinent part:

> "4. Effect of Non-Compliance
>
> (a) Upon the expiration of the time limits prescribed by Section 3:
>
> (1) A defendant in custody solely because he is awaiting trial and whose trial has failed to commence through no fault of the accused or his attorney shall be released subject to such conditions as the court may impose in accordance with 18 U.S.C. 3146."

Thus, it is clear from the statute and the Interim Plan that the trial of detained individuals must commence within 90 days following the beginning of detention. If trial is not commenced within this period, defendants must be released. [4] There is no dispute that the moving defendants have been in continuous federal custody in excess of 90 days. [5]

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[4] Defendants' motion was made on May 20, 1976, the 91st day of confinement.

[5] The only other requirement for release set out in §3164(c) and in Rule 4(a)(1) of the Interim Plan is that the defendants' trial has failed to commence through no fault of the accused or his attorney. I have little doubt that verbose and often irrelevant argument and cross-examination by defense counsel has significantly delayed the completion of pretrial hearings and the commencement of trial in this action. Nevertheless, I cannot in good conscience hold that such behavior rises to the level of "fault" within the meaning of §3164(c) and Rule 4 of the Interim Plan.

The government first argues that the defendants need not be released since the trial may be deemed to have commenced with the commencement of pretrial hearings on May 17, 1976 (i.e., within the 90 day period). I cannot accept this argument. It is clear that the terms of the Speedy Trial Act itself distinguish a "trial" from "pretrial" proceedings. A trial in a jury case is deemed to commence at the beginning of voir dire. 6/

6/ This definition or measurement of the period commencing trial was explicitly adopted in the Plan for Prompt Disposition of Criminal Cases (hereinafter "Plan for Prompt Disposition"), prepared pursuant to the requirements of the Speedy Trial Act of 1974, and approved and adopted by the judges of the United States District Court for the Southern District of New York, effective July 1, 1976. The Plan for Prompt Disposition was formulated in consultation with, and after considering the recommendations of, the Speedy Trial Planning Group for the Southern District of New Ycrk, and is subject to approval as required by 18 U.S.C. §3165(c). With regard to the measurement of the commencement of trial, reference should be made to Section III, 5(e)(2), at p.III-7 and Section III, 6(c)(3), at p.III-10.

I therefore hold that for purposes of the 90-day trial requirement of 18 U.S.C. §3164(b), and Rule 3 of the Interim Plan, trial of this action has not yet commenced.

The government next argues that even if this trial is not deemed to have commenced, the exclusionary periods set forth in 18 U.S.C. §3161(h) [7/] and in Rule 6 of the Interim Plan may be applied to the 90-day requirement. If the §3161(h) exclusions do apply, the time expended on pretrial hearings would be excluded from the 90-day period, and the moving defendants would not be entitled to release.

7/ 18 U.S.C. §3161(h) provides, in pertinent part, as follows:

> "(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence.
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--
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> ...
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> (E) delay resulting from hearings on pretrial motions;
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> ...
>
> (G) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement."

The applicability of the §3161(h) exclusions to §3164 is far from explicit. Nevertheless, a careful reading of the legislative history of the Speedy Trial Act of 1974 leads to the conclusion that it was the intent of Congress to have the exclusions set out in §3161(h) apply to the interim limits of §3164 as well.

Section 3164 was introduced in order "that certain minimal speedy trial requirements be placed into operation ... pending the full effectiveness of sections 3161 and 3162." Senate Committee on the Judiciary, Speedy Trial Act of 1974, Report on S. 754, S.Rep. No. 93-1021, 93rd Cong., 2d Sess., at p. 45 (1974) (hereinafter "Senate Committee Report"). Section 3164 itself states merely that its intent is "to assure priority in the trial or disposition" of certain cases by imposing shorter time limits for certain cases during the interim period of the Act. It seems highly doubtful that Congress could have intended that the "minimal speedy trial requirements" of §3164 operate more strictly and with harsher results than will apply under §3161(b) and (c) when the Act takes full effect. 8/

8/ When §3161(b) and (c) go into effect on July 1, 1979 (and §3164 thereby ceases to operate) there will be a 100-day time limit excluding periods of excusable delay in which all defendants must be

(Footnote continued)

Furthermore, nothing in the statutory history indicates that §3164 was intended to create a separate category of cases to which the excludable periods would not apply. Indeed, Congress provided for exclusions "in recognition of the impossibility of providing rigid time limits for the trial of criminal cases." House Committee on the Judiciary, Speedy Trial Act of 1974, Report on H.R. 17409, H.Rep. No. 93-1508, 93rd Cong., 2nd Sess., at p.21 (1974) (hereinafter "House Committee Report"). Exclusions were provided to insure "that the rights of the individual to a complete and full hearing are not trampled in the headlong rush for the disposition of a trial." Id. at p.15. The House Committee Report concluded that:

> "The Committee believes that both delay and haste in the processing of criminal cases must be avoided; neither of these tactics inures to the benefit of the defendant, the Government, the courts nor society. The word speedy does not, in the Committee's view denote assembly-line justice, but efficiency in the processing of cases which is commensurate with due process." Id.

(Footnote continued from previous page)

brought to trial. It is anomolous at best that the exclusionary periods of §3161(h) should not apply to §3164 during the interim period merely because Congress failed to recognize explicitly the applicability of excludible periods to §3164.

Further support for the proposition that the excludable periods of §3161 apply to §3164 is to be found in the origins of that section. The Senate Committee Report indicates that the interim plans would be similar to the plan which had been adopted by the United States Court of Appeals for the Second Circuit. See Senate Committee Report, at p.45. In this regard, the Senate Report noted that:

> "[The Second Circuit] rules require the Government to be ready for trial ... within 90 days if he is detained. The rules also allow a number of traditional exclusions (i.e., for certain pretrial proceedings), suggested by the American Bar Association Standards and contained in many modern speedy trial statutes." Id. at p. 17.

Thus, Congress intended that the interim plans be similar to the one adopted by the Second Circuit--i.e., incorporating the "traditional exclusions." 9/

9/ Prior to the adoption of the Interim Plan on September 29, 1975, Rule 3 of the Plan for Achieving Prompt Disposition of Criminal Cases provided in pertinent part, as follows:

> "3. Detained Defendants: Trial Readiness and Effect of Non-Compliance.
>
> In cases where a defendant is detained, the government must be ready for trial within ninety days from the date of detention. If the government is not ready for

(Footnote continued)

Since §3164 is to be read in harmony with that Second Circuit plan, it must incorporate as well the traditional exclusions as enumerated in §3161.

I am of the view that a careful reading of the Speedy Trial Act of 1974, and the relevant legislative history, compel the conclusion I have reached. This Act, like any other statute, must be read in such a way as to render it a sensible and workable whole. As Mr. Justice Frankfurter observed in United States v. Shirey, 359 U.S. 255, 260-61 (1959):

(Footnote continued from previous page)

> trial within such time, and if the defendant is charged only with non-capital offenses, the defendant shall be released upon bond or his own recognizance or upon such other conditions as the district court may determine, unless there is a showing of exceptional circumstances justifying the continued detention of the defendant, and then the detention shall continue only for so long as is necessary."

Rule 5 of that Plan sets out various excluded periods (including an exclusion for pretrial motions); by the terms of the Plan these excluded periods applied to the 90-day trial requirement of Rule 3.

"Statutes, including penal enactments, are not inert exercises in literary composition. They are instruments of government, and in construing them 'the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.' United States v. Whitridge, 197 U.S. 135, 143, 25 S.Ct. 406, 408, 49 L.Ed. 696. This is so because the purpose of an enactment is embedded in its words even though it is not always pedantically expressed in words. See United States v. Wurzbach, 280 U.S. 396, 399, 50 S.Ct. 167, 168, 74 L.Ed. 508. Statutory meaning, it is to be remembered, is more to be felt than demonstrated, see United States v. Johnson, 221 U.S. 488, 496, 31 S.Ct. 627, 55 L.Ed. 823, or, as Judge Learned Hand has put it, the art of interpretation is "the art of proliferating a purpose." Brooklyn Nat. Corp. v. Commissioner of Internal Revenue, 2 Cir., 157 F. 2d 450, 451. In ascertaining this purpose it is important to remember that no matter how elastic is the use to which the term scientific may be put, it cannot be used to describe the legislative process. That is a crude but practical process of the adaptation by the ordinary citizen of means to an end, except when it concerns technical problems beyond the ken of the average man."

Similarly, Mr. Justice Reed has stated:

'There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning

> has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940) (footnotes omitted).

I must point out that my analysis leads to a conclusion which is contrary to that reached in two recent opinions. Research has uncovered only two cases which have dealt with the applicability of the §3161 exclusions to §3164. In United States v. Steven Soliah, Crim. No. 75-523 (E.D. Cal., January 14, 1976), [10/] Judge Wilkins ruled that the §3161(h) exclusions do not "apply to a defendant who is incarcerated solely for the purpose of awaiting trial." The ruling was based first on the rationale that Sara Jane Moore v. U.S. District Court, Crim. No. 75-3384 (9th Cir., Nov. 12, 1975) had

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10/ The opinion is reported in Issuance #10 of the Administrative Office of the United States Courts, February 11, 1976.

by implication rejected the contention that excludable delay applies to §3164. Second, Judge Wilkins rejected the argument based on an analysis of the legislative history of the Speedy Trial Act which relies on the former Second Circuit plan since the Second Circuit plan "contained an explicit provision incorporating exclusions to the situation where the defendant is incarcerated solely for the purpose of awaiting trial." Finally, Judge Wilkins felt compelled to follow General Order #63 of his District, which requires release of an incarcerated defendant whose trial has not commenced within 90 days. Even if the Speedy Trial Act, standing alone, would require periods of time to be excluded from the computation of the 90-day time limit, Judge Wilkins was of the view that a District Court plan could be more restrictive than the Speedy Trial Act itself in making sure that the trials of incarcerated defendants proceed within the 90-day pericd. 11/

11/ I agree with Judge Wilkins that an interim plan may be more restrictive than the statute. However, to the extent that such a plan may be inconsistent with the language and intent of the statute, it cannot be binding.

More recently, in United States v. Tirasso, [12/] Crim. No. 76-1571 (9th Cir., March 25, 1976) the Court held that §3164 "does not provide any period of exclusion for delay occasioned by the special circumstances of difficult cases." In footnote 1 of its opinion, the Court opined as follows:

> "We note, by way of contrast, that the statute provides an elaborate series of exceptions or exclusions applicable to the permanent and transitional periods. 18 U.S.C. §3161(h). The fact that such exceptions or exclusions were explicitly provided in one portion of the statute but not in the other may have been the product of a drafting error, or perhaps was caused by a misunderstanding of the practical requirements of criminal administration. In any event, the contrast in the statute requires us to find that the clearly expressed congressional intent is to provide no periods of exclusion for the ninety-day trial requirement applicable during the interim period."

12/ The opinion is reported in Issuance #12 of the Administrative Office of the United States Courts, March 30, 1976.

As I have indicated, I do not believe that these cases properly reflect the intent of Congress in drafting the Speedy Trial Act of 1974.

I recognize that Rule 6 of the Interim Plan which sets out the various excluded periods, by its terms refers only to computations made under Rule 5--the six-month rule. By negative implication it might appear, as defendants contend, that the Interim Plan expressly bars the exclusion of any of the Rule 6 excluded periods in computing the time requirements for trial of defendants in custody pursuant to Rule 3 of the Interim Plan. Indeed, this reading of the Interim Plan is confirmed in the Plan for Prompt Disposition, Section III, at p.III-12. [13] It is clear that with regard to computing any time limit under Section 6 (which relates to the 90-day rule regarding defendants in custody) there was a clear intention not to exclude any of the time periods set forth in

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13 / "10. Exclusion of Time From Computations

(a) Applicability. In computing any time limit under sections 3, 4, 5 or 7, the periods of delay set forth in 18 U.S.C. §3161(h) shall be excluded."

As indicated in note 6, supra, the Plan for Prompt Disposition, if approved, will not become effective until July 1, 1976.

§3161(h). Lest there be any doubt in this regard, I have communicated with Professor Michael Martin of Fordham Law School who served as Reporter for the Plan for Prompt Disposition; Professor Martin has confirmed my reading of the Plan for Prompt Disposition.

However, the proposed Plan for Prompt Disposition is not yet operative. While it must be conceded in light of the above recited legislative history that the planning group responsible for the formulation of the Plan for Prompt Disposition intended not to exclude time devoted to pretrial hearings, I am not convinced that the Board of Judges in adopting the Plan was fully aware of its implications. The question was not raised or discussed by the Board of Judges. In any event the current provisions of the Interim Plan, like the statute itself, do not compel the conclusion that time spent on pretrial hearings is not to be excluded. Therefore, I give the current Interim Plan a reading consistent with my understanding of the statute.

The government has represented that various of the moving defendants are illegal aliens and that several have entered this country with forged passports. Furthermore, the government indicates that it is impossible to establish the true identity of the defendants

with any certainty. Based on these facts, and its experience with respect to other individuals with whom the defendants are alleged to have associated, the government strongly believes that release of the defendants will in practical effect mean their imminent absence from this jurisdiction. 14 /

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14 / The moving defendants were arrested, some on September 3, and others on October 4, 1974, by state authorities. Defendants were held in state custody from the date of arrest until their indictment on February 19, 1976 by federal authorities. Mejias, Padilla, Salazar - Cadena, and Valenzuela, who, as has been indicated, is not involved in this motion, prevailed in the state courts on a motion to suppress evidence seized at the time of arrest from their person and upon a search of Mejias' apartment. They seek similar relief here. The evidentiary hearing on their motion to suppress consumed nearly a full week. Yet, such a hearing took over three weeks in the state court.

Moreover, defendants assert other violations of their right to a speedy trial. They contend that a 1974 state-federal decision for the state to prosecute them which was followed (after the state had lost the motion to suppress) by a subsequent state-federal decision for the federal government to proceed against them constitutes forum shopping. Cf. United States v. Lara, 520 F. 2d 460 (D.C. Cir. 1975). Defendants would have us count their state arrest and time in custody against the government for speedy trial purposes. While I consider their theory to be conceptually flawed, absent a clear and particularized showing of federal-state contrivance, because the parallel existence of the state and federal governments as separate

(Footnote continued)

It is clear that the issues raised on this motion are of vital significance to the continued effective administration of criminal justice in this District and Circuit, and a definitive resolution is urgently

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(Footnote continued from previous page)

sovereign entities is disregarded, the defendants seem to have authoratative support for their contentions. See Gravitt v. United States, 523 F. 2d 1211 (5th Cir. 1975).

Thus, defendants have delayed commencement of the trial by raising complex and novel issues requiring serious consideration. If pretrial hearings are not excluded from the 90-day limitation, courts in similar situations will be pressured either to give short shrift to a detainee's pretrial claims or to grant him his freedom in full recognition and expectation that once free he will flee. Obviously, these considerations are irrelevant if Congress intended that pretrial hearings not be excluded from the 90-day computation. I would suggest, however, that it is these considerations (the protection of a defendant's right to an evidentiary determination of his pretrial claims and the obligation of the court to give such contentions the careful attention and time justice requires) which make it inconceivable, at least to me, that Congress purposed the result the defendants urge.

needed. In this age of multi-defendant, multi-count indictments, often charging conspiracies of long duration and international scope, it is evident that this issue is likely to recur with ever-increasing regularity.

Defendants' motion for release pursuant to 18 U.S.C. §3164(b) and (c) is hereby denied.

SO ORDERED.

Dated: New York, New York
May 24, 1976

ROBERT L. CARTER
U.S.D.J.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
SUPREME COURT BUILDING
WASHINGTON, D.C. 20544

AND F. KIRKS
DIRECTOR
AM E. FOLEY
DEPUTY DIRECTOR

March 30, 1976
Issuance #12

TO: All Federal Judges, Planning Group Members, and Circuit Executives

Speedy Trial Advisory

SUBJECT: DECISION IN UNITED STATES v. TIRASSO, INTERPRETING "INTERIM" TIME LIMITS UNDER 18 U.S.C. § 3164

In an opinion written by Judge Kennedy, the Court of Appeals for the [illegible]nth Circuit has held that the exclusions of 18 U.S.C. §3161(h) do not [illegible]pply to computations under the 90-day "interim" time limit. The case is United States v. Tirasso, No. 76-1571, March 25, 1976. The other members of the panel were Judges Goodwin and Sneed.

The text of the opinion follows:

Appellants Tito Lombana-Pineres and Pietro Tirasso were indicted in the Southern District of New York on charges stemming from an alleged attempt to smuggle 20 kilograms of cocaine into the United States from Colombia. They were arrested on November 19, 1975. Subsequently a criminal complaint was issued in the District of Arizona and the New York indictment was dismissed. On January 5, 1976, a magistrate ordered the appellants' removal to the District of Arizona, where they were indicted on January 20, 1976. A superseding indictment was issued February 18, 1976, and trial was set for April 13, 1976.

Since their arrest, appellants have remained in continuous custody in lieu of $100,000 bail. Appellants' motion for release from custody on their own recognizance was denied by the district court. They appeal, arguing that the Speedy Trial Act of 1974, 18 U.S.C. § 3164, mandates their release because they have been in continuous custody for more than ninety days awaiting trial.

Appellants do not charge the government with bad faith in causing their removal to Arizona or in failing to bring them to trial immediately. The delays were necessary to gather evidence of a criminal conspiracy whose dimensions grew as the investigation proceeded, and which eventually proved to be of massive proportions.

The New York arrest and indictment charged appellants only with conspiracy to undertake a single transaction involving three defendants, but the subsequent Arizona indictments alleged that appellants engaged in a series of criminal transactions involving twenty-two defendants, in ten separate states, the Commonwealth of Puerto Rico, and four foreign countries. Arrest of the appellants prior to the conclusion of the investigation was necessary because they were foreign nationals, who had arrived only recently from abroad and were likely to leave the country at any time. While appellants could have been tried immediately for a portion of the conspiracy in the Southern District of New York, it was reasonable to remove them to Arizona, the hub of this far-flung conspiracy. Indeed, removal of such a case is required for the sound administration of criminal justice; the action conserved judicial resources and the resources of the defendants.

Appellants do not dispute the reasonableness of the procedures, the fact that the delay was occasioned by a lengthy investigation of a serious and massive criminal scheme, the good faith of the government, or the high probability that defendants will flee to foreign country. But they argue that such considerations are irrelevant. They point out that the statute unconditionally mandates release from custody in all cases where the defendants have not been brought to trial within ninety days of arrest. 18 U.S.C. § 3164(c).

We are constrained to agree. The language of section 3164 is straightforward. We find no ambiguity in its interpretation. Subsection (b) provides that the trial of persons held in custody solely because they are awaiting trial must commence within ninety days following the beginning of such continuous detention. Subsection (c) provides that the failure to commence trial within the ninety day period, where such failure is not occasioned by the fault of the accused or his counsel, must result in an automatic review by the court of the conditions of release, and further that "no detainees . . . shall be held in custody pending trial after the expiration of such ninety-day period . . . ." Under the clear language of the statute the reason for delay is irrelevant, so long as it is not occasioned by the accused or his counsel.

The legislative history, moreover, makes it clear that release of the defendant from custody, and nothing less, is the sanction for delay beyond the ninety-day period. "Failure to commence the trial of a detained person under this section results in the automatic review of the term of release by the court and, in the case of a person already under detention, release from custody." S. Rep. No. 1021, 93d Cong., 2d Sess., reproduced in, 4 U.S. Code Cong. & Ad. News 7401, 7416 (1974) (emphasis added).

The government contended below that the ninety-day period has not expired, since appellants have been in custody in the District of Arizona only since January 5, 1976. Appellants, however, contend that they have been in continuous custody for the same offense since November 19, 1975, and the fact that a portion of the detention occurred in the Southern District of New York is of no consequence.

Section 3164 does not speak of detention within a particular district. Nor does it provide any period of exclusion for delay occasioned by the special circumstances of difficult cases.[1] The statute simply provides that "the trial of any person [detained solely because they are awaiting trial] shall commence no later than ninety days following the beginning of such continuous detention." While the offense charged in the Arizona indictment is of a substantially larger scope than that charged in the New York indictment, they are both based on many of the same operative facts, and they are not, therefore, completely discrete offenses for which separate ninety-day periods might be applicable. Since appellants have been in custody for over ninety days awaiting trial on these charges, we hold that the clear and unambiguous terms of the Speedy Trial Act mandate their release pending trial.

We are fully aware of the dangers inherent in today's decision. The charges against these defendants are serious. We are not dealing with a haphazard attempt by amateurs to run the border with a small quantity of controlled substance, but rather with a sophisticated enterprise for importing wholesale quantities of dangerous drugs into the United States. The value of the 20 kilogram shipment alleged in the New York indictment was estimated between $500,000 and $600,000. The government's case, as now pleaded, alleges a series of six such transactions involving these two appellants. Appellant Tito Lombana has been identified as "the head of a huge organization responsible for sending large quantities of cocaine into the United States." Appellant Tirasso is identified as Lombano's liaison in the United States and as a direct participant in at least one previous transaction involving 5 kilograms of cocaine. Under these allegations the United States has the greatest interest in bringing these individuals to justice.

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[1] Our analysis is confined to § 3164, which pertains to all defendants in pretrial custody during the interim period from September 29, 1975, through June 30, 1979. We note, by way of contrast, that the statute provides an elaborate series of exceptions or exclusions applicable to the permanent and transitional periods. 18 U.S.C. § 3161(h). The fact that such exceptions or exclusions were explicitly provided in one portion of the statute but not in the other may have been the product of a drafting error, or perhaps was caused by a misunderstanding of the practical requirements of criminal administration. In any event, the contrast in the statute requires us to find that the clearly expressed congressional intent is to provide no periods of exclusion for the ninety-day trial requirement applicable during the interim period.

Release of these two foreign nationals from custody is tantamount to an invitation to flee across the Mexican border, less than 3 hours away. The district court, is denying appellants' motion for release, noted that there was virtually no way to assure the appearance for trial of a foreign national once he is set free in the District of Arizona. Defense counsel all but admitted that appellants, once released, could not be counted upon to appear. We have no doubt of the correctness of this proposition.

In light of these facts, the wisdom of the result Congress has decreed is questionable. We release a man alleged to be the head of a foreign criminal organization dedicated to the smuggling of large quantities of illegal drugs, so that he may quickly cross the border and resume operating his business. We are also releasing his alleged right-hand man, as if to make certain that the enterprise continues to operate at top efficiency. But this result is the only one open to us under the plain terms of the statute.

It is discouraging that our highly refined and complex system of criminal justice is suddenly faced with implementing a statute that is so inartfully drawn as this one. But this is the law, and we are bound to give it effect.

It is therefore ordered that the district court release the appellants within 48 hours of the filing of this opinion upon such terms and conditions as the court may deem reasonable and not inconsistent with the views expressed herein.

The mandate will issue now.

Remanded.

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William E. Foley
Deputy Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
SUPREME COURT BUILDING
WASHINGTON, D.C. 20544

ROWLAND F. KIRKS
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February 11, 1976
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TO: All Federal Judges, Planning Group Members, and Circuit Executives

Speedy Trial Advisory

SUBJECT: DECISION IN UNITED STATES v. SOLIAH, INTERPRETING "INTERIM" TIME LIMITS UNDER 18 U.S.C. § 3164

The following is an excerpt from the transcript of proceedings before Judge Philip C. Wilkins in United States v. Steven Soliah, Criminal No. 75-523, Eastern District of California, January 14, 1976:

THE COURT: The government has moved for a 30-day continuance in this matter because one of its witnesses will be unable to testify at the time currently set for trial, due to the fact that this witness is nearing termination of her pregnancy which is complicated by diabetes, from the doctor's statement and representations that Mr. Nichols, on behalf of the United States Attorney's Office made.

The Court agrees that this does present a compelling reason for granting a continuance, however, we do not agree that the continuance can be granted without releasing the defendant from custody pursuant to the bail act.

First, I do not agree that the periods of delay which may be excluded from the computation of the trial date found in United States Code Section 3161(h), apply to a defendant who is incarcerated solely for the purpose of awaiting trial.

By implication, in the case of Sara Jane Moore, against the United States District Court, the Ninth Circuit has rejected this contention.

The Circuit Court in that case could have held that the provisions of 3161(h) are incorporated into 3164 but they did not. Instead the Court merely held that a person who is undergoing a 4244 examination is not a defendant detained solely because he is awaiting trial during the time of the study and the hearings on the study.

Secondly, there is no provision in the Speedy Trial Act which makes Section 3161(h) applicable to the interim limit found in Section 3164.

The Second Circuit rules upon which the government relies in its analysis of the legislative history of the Speedy Trial Act contained an explicit provision incorporating exclusion to the situation where the defendant is incarcerated solely for the purpose of awaiting trial.

The next step in the government's argument is even more difficult to accept because it is built upon the shaky foundation, which I earlier referred to.

The government concedes that General Order Number 63 promulgated by this district, last September, and adopted, requires on its face that an incarcerated defendant be released if his trial has not commenced within the 90-day period.

It argues, however, that despite this mandatory language, the general order must be interpreted to allow the Section 3161(h) period of delay to be excluded from the computation of the 90-day time limit.

This Court rejects that for three reasons.

First, as earlier stated, the Court disagrees with the foundation, namely, that the Speedy Trial Act, standing alone, would require the periods of time to be excluded from the computation of the 90-day limit.

Second, accepting for the moment this contention, the Court sees no reason why a district plan may not be more restrictive than the Speedy Trial Act itself in making sure that the trials of incarcerated defendants proceed within the 90-day period.

Third, Section 7 of the district plan expressly incorporates Section 3161(h) with respect to retrial; this provides additional evidence for the proposition that such periods of delay were not intended to be excluded in the initial trial of an incarcerated defendant, which is the case we have here.

Other comments seem appropriate at this point. In view of the Court's determination with respect to bail in this case, it is reluctant to take the step it is now taking. However, I feel compelled by my interpretation of the Speedy Trial Act as passed by the Congress, and the general order promulgated by this district to do so.

* * * *

William E. Foley
Deputy Director